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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Verizon Telephone Companies)	
)	WC Docket No. 03-157
Petition for Forbearance from the)	
Current Pricing Rules for the)	
Unbundled Network Element Platform)	

OPPOSITION OF TELSCAPE COMMUNICATIONS, INC.

Pursuant to the Commission's July 1, 2003 Public Notice, Telscape Communications, Inc. ("Telscape") through counsel, hereby files its comments in the above-referenced proceeding.¹

Telscape is a Monrovia, California-based facilities-based competitive local exchange carrier ("CLEC") which operates the nation's only fully bilingual network using its own Nortel DMS 500 switches, in addition to the combination of unbundled network elements ("UNEs") commonly referred to as UNE-Platform ("UNE-P"), in those areas where Telscape's own facilities are not available. Since its founding in 1999, Telscape has focused on the telecommunications needs of Hispanic consumers in Southern California, where the company currently provides over 60,000 consumers with bundled packages of local, long distance, and enhanced services.

¹ *Pleading Cycle Established for Verizon Petition for Expedited Forbearance from the Commission's Current Pricing Rules for the Unbundled Network Element Platform*, WC Docket No. 03-157, Public Notice, DA 03-2189 (rel. July 3, 2000); *Verizon Telephone Companies; Petition for Forbearance from the Current Pricing Rules for the Unbundled Network Element Platform*, WC Docket No. 03-157, DA 03-2333 (rel. July 15, 2003) (establishing August 18, 2003 as deadline for filing of comments and September 2, 2003 as the reply date).

I. INTRODUCTION AND SUMMARY

Whether Verizon likes it or not, in passing the Telecommunications Act of 1996 “Congress passed a rate setting statute with the aim not just to balance interests between sellers and buyers, but to reorganize markets by rendering regulated utilities’ monopolies vulnerable to interlopers, even if that means swallowing the traditional federal reluctance to intrude into local telephone markets,”² a fact that the BOCs often seem to lose sight of.

In this pleading Telscape urges the Commission to deny Verizon the relief requested in its so-called “forbearance petition”³ pursuant to Section 10 of the Act.⁴ Telscape submits that the *Verizon Petition* amounts to nothing more than another one of Verizon’s ad hominem attacks upon UNE-P and TELRIC in the wake having the very same arguments set forth in this petition rejected by the Supreme Court just over a year go in its decision in *Verizon Communications Inc., v. FCC*. There, the Supreme Court affirmed the Commission’s TELRIC pricing rules, as well as the Commission’s combination rules, which in part, give rise to Verizon’s legal obligation to provide the UNE-P.⁵

Nonetheless, through the filing of this baseless petition Verizon is forcing both competing carriers and the Commission to waste scarce resources responding to Verizon’s tired, recycled arguments that have already been properly rejected by both the Commission and the courts on a number of occasions. The timing of the filing of the *Verizon Petition* is particularly questionable in light of the fact that the Commission is about to release the text of its long

² See *Verizon Communications Inc., v. FCC*, 535 U.S. 467, n. 3 (2002) (“*Verizon v. FCC*”).

³ *Verizon Petition for Expedited Forbearance from the Commission’s Current Pricing Rules for the Unbundled Network Element Platform*, WC Docket No. 03-157, Public Notice, DA 03-2189 (rel. July 3, 2003) (hereinafter “*Verizon Petition*”).

⁴ 47 U.S.C. § 160

⁵ 47 C.F.R. §§ 51.315 (c)-(f).

awaited *Triennial Review Order*, which will address the issues relating to both the continuing availability of the UNE-P and changes to the TELRIC methodology. Accordingly, while adjustments to the TELRIC methodology may or not be appropriate in the future, the Commission cannot and should not address such issues in the context of this petition.

Furthermore, if the Commission decides to treat the *Verizon Petition* as a properly filed forbearance petition and accord it the benefit of the statutory deadlines set forth in Section 10(c), even in the face of its procedural infirmities, the Petition, on its face, fails to satisfy the substantive criteria set forth in Section 10 for forbearance from enforcement of the UNE-P and TELRIC regulations. Under Section 10(d), the Commission is not empowered to forebear from enforcement of the requirements of Section 251(c) and Section 271 until such time as those requirements have been fully implemented, which Telscape submits they clearly have not. Moreover, the *Verizon Petition* fails to satisfy the criteria of Section 10(a) (1)-(3) or Section 10(b). Therefore, the Commission should promptly reject this petition.

II. THE COMMISSION MAY NOT GRANT VERIZON ITS REQUESTED RELIEF BECAUSE NEITHER SECTION 271 NOR SECTION 251(C) OF THE ACT HAVE BEEN “FULLY IMPLEMENTED” AS REQUIRED BY SECTION 10(D).

Verizon asks the Commission to grant its petition for forbearance pursuant to section 10 of the Act.⁶ Specifically, the *Verizon Petition* requests that the Commission: (1) forbear from its decision permitting UNE-P carriers to collect per-minute access charges from long distance carriers;” and (2) “forbear from applying its current TELRIC pricing rules to the UNE platform”⁷ because “the problems inherent in TELRIC are exacerbated by applying it to the so-called UNE platform,” and because UNE-P providers are “merely reselling services over

⁶ 47 U.S.C. § 160.

⁷ *Verizon Petition*, 1.

existing facilities without making any investments” thereby contributing to the “massive decline in investment in the telecommunications industry.”⁸ Verizon apparently cut and pasted these arguments directly from its briefs to the Supreme Court in the *Verizon v. FCC* without realizing that they were the same arguments the Court rejected just last year. Accordingly, the Commission should reject out of hand the Verizon’s cynical request to forbear from applying the Commission’s access charge rules and TELRIC rules to UNE-P carriers.

As an initial matter, Telscape notes that the *Verizon Petition* is procedurally flawed, in that Verizon has failed to comply with the procedural requirement set forth in Section 10(c), which requires that forbearance petitions be clearly identified in the caption as such. Accordingly, the Commission is not required to treat the petition as a section 10(c) petition and accord it the benefits of the statutory deadlines for Commission resolution. Besides its procedural problems, however, the relief requested in Verizon’s petition fails to meet the criteria for forbearance set forth in Section 10 of the Act.

Verizon strains credulity when it implicitly asserts that either of these provisions have been fully implemented. In fact, glaringly absent from Verizon’s pleading is any affirmative assertion that the interconnection, unbundling, resale, collocation and other obligations of Section 251(c) are fully implemented. Aside from Verizon’s flimsily supported “forbearance” requests, the remainder of Verizon’s pleading consists of nothing more than the worn out rhetoric that Verizon and the BOCs have endlessly repeated in their rants against the UNE-P. It is abundantly clear to any casual observer that neither Section 271, nor Section 251 are fully implemented as required by Section 10.

⁸ *Verizon Petition*, i-ii.

A. Section 271 Has Not Been “Fully Implemented”

Section 10(d) of the Act prohibits the Commission from forbearing from application of the requirements of Sections 251(c) and 271 until such time as the requirements of those sections have been “fully implemented.”⁹ Verizon appears to argue (apparently with a straight face and without citing any relevant authority) that both sections have been “fully implemented.” Verizon goes so far as to assert that “the Commission itself has concluded” that Section 271 is fully implemented once a carrier receives long distance authority in a given state.¹⁰

Section 10(d) requires an affirmative finding by the Commission that Sections 251(c) and 271 have been “fully implemented” before the Commission can consider forbearance from any of those provisions. It cannot be seriously argued that either provision has been “fully implemented.” With respect to Section 271, while the BOCs have gained authority in a number of states, neither the FCC nor any state commission has found that Section 271 has been “fully implemented,” and Verizon cites no authority in its petition for that assertion. In fact, today, even after the grant of Section 271 authority in all but nine of the fifty states, commissions all across the country have on-going section 271 compliance dockets to monitor the BOCs’ compliance with “performance assurance plans,” in order to ensure wholesale performance that is consistent with the Section 271 competitive checklist. Indeed, in New York, the first state where a BOC was granted Section 271 authority, the New York Public Service Commission has an ongoing Section 271 compliance proceeding.¹¹

⁹ 47 U.S.C. § 160(d).

¹⁰ *Verizon Petition*, 19 n. 38.

¹¹ *See Case 99-C-0949 Petition Filed By Bell Atlantic-New York for Approval of a Performance Assurance Plan and Change Control Assurance Plan, filed in Case 97-C-0271*, Notice Inviting Comments (June 4, 2003) (Seeking comments in the NYPSA’s

Furthermore, the existence of Section 272(d), providing for the sunset of certain provisions of Section 272 three years after a BOC receives Section 271 authority belies Verizon's assertion that Section 271 requirements cease to exist following the grant of authority. Indeed if Verizon actually believed that Section 271 obligations magically dissipate once it receives authority in a given state, it is curious that Verizon has filed petitions for forbearance from enforcement of provisions of Section 271 well beyond the date when it had received such authority.¹² The fact is that the Section 271 obligations do not automatically go away upon a finding that a BOC has complied with the checklist in an in-region InterLATA entry proceeding.

B. Section 251(c) Has Not Been "Fully Implemented"

Section 251(c) generally requires Verizon to provide nondiscriminatory access to its network by providing unbundled network elements, resale, and collocation. Both state and Commission proceedings interpreting the precise contours of the Section 251(c) obligations have been going on since 1996, and continue on to this day. Accordingly, Section 251(c) obviously is far from "fully implemented." Obviously, the requirements of sections 251 and 271 are not self-executing, and can be enforced only by the Commission. Further, Verizon has failed to demonstrate in its petition that Sections 251 and 271 have been fully implemented. Accordingly, the Commission must deny the *Verizon Petition*, because the Commission has no authority to forbear from applying the requirements of section 251(c) or 271 in the absence of full implementation.

annual review of whether changes or additions are necessary to Verizon-New York's performance assurance plan).

¹² *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c)*, CC Docket No. 01-338 (filed July 29, 2002).

III. THE *VERIZON PETITION* FAILS TO SATISFY THE CRITERIA OF SECTION 10(A)

In order to grant a petition for forbearance, Section 10(a) of the Act requires that the Commission determine that:

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier...are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.¹³

Under this standard, as explained below, the Commission must reject Verizon's petition. Both Verizon's request to forebear from enforcement of the access charge rules and its request to forbear from application of TELRIC fail to satisfy Section 10(a) of the Act. Indeed, grant of the *Verizon Petition* would result in discriminatory pricing for UNEs and unjust and unreasonable double recovery by the BOCs. Moreover, it would harm consumers and harm the public interest, and the Commission should reject it out of hand.

A. **Verizon's Request That The Commission Forbear From Allowing CLECs to Collect Access Charges On UNE-P Lines Fails to Satisfy Section 10(a)**

Verizon seeks a rule whereby it would be the collector of per-minute access charges instead of the UNE-P carrier. In support of its request, Verizon alleges that TELRIC pricing "diverts access charge revenues that were designed to support the network infrastructure and simply adds to the uneconomic arbitrage opportunity available to UNE-P carriers."¹⁴

Verizon argues that "marketplace experience since the Commission's decision [to allow CLECs

¹³ 47 U.S.C. § 160 (emphasis added).

¹⁴ *Verizon Petition*, 4.

leasing UNEs to collect access charges] has demonstrated that UNE-P rates clearly do not provide incumbents recovery of any real-world measure of their costs.”¹⁵

But besides this baseless statement, Verizon has failed to provide any legal or policy justification for its request that the Commission “eliminate the fiction that a UNE-P carrier is providing exchange access on long distance calls” so that Verizon would be entitled to the per-minute exchange access charges rather than the UNE-P carrier.¹⁶ Verizon’s request that the Commission eliminate the ability of UNE-P carriers to collect access charges because “UNE-P rates do not allow for sufficient recovery of real world costs”¹⁷ belies reality and conflicts directly with what Verizon and the other BOCs tell Wall Street analysts about their costs. As Professor Yale Braunstein explained:

SBC has argues that in California, UNE-P rates of \$29.39 per line are necessary to cover its costs. At the same time, the company has reported to Wall Street analysts that its revenues per line are \$29.81 and that its earnings are between \$11.92 and \$14.91 per line. It is difficult to understand how a company that generates revenues of \$29.81 per month and incurs costs of \$29.39 per month can experience earnings of as high as \$14.91 per line. SBC has proposed UNE-P prices that would leave it in the enviable position of generating roughly \$29 in revenues per customer, whether or not that customer switched to a competitor.¹⁸

Sections 251(c)(2) and 251(c)(3) empower CLECs to provide exchange access service over UNEs, including UNE combinations like UNE-P, and this finding is codified in the

¹⁵ *Verizon Petition*, 16.

¹⁶ *Verizon Petition* at iii.

¹⁷ *Id.*

¹⁸ See “*The Role of UNE-P in Vertically Integrated Telephone Networks: Ensuring Healthy and Competitive Local, Long-Distance and DSL Markets*” Yale M. Braunstein, University of California-Berkeley (May 2003).

FCC's rules.¹⁹ Except pursuant to an expired transition rule,²⁰ Verizon has never been permitted to collect access charges on UNEs. Moreover, Verizon has never been considered the exchange access provider over UNEs. Even Verizon concedes that the Commission determined seven years ago that permitting BOCs to collect access charges on UNEs violates the cost-based pricing standard of the Act. As the FCC noted in that decision, "if we were to require ... carriers purchasing unbundled network elements to also pay access charges, then incumbent LECs would receive compensation in excess of their underlying network costs. This result would be inconsistent with the pricing standard for unbundled elements set forth in section 252(d)(1)."²¹

At bottom, the *Verizon Petition* is not a request for forbearance at all, but rather, constitutes a request for the Commission to overturn existing rules that would and unreasonably allow Verizon to collect access charges on UNE-P lines, thereby reaping windfalls well in excess of the TELRIC rates paid by CLECs that lease the lines. Such a result would run counter to the Commission's determination that UNE-P CLECs are facilities-based. Indeed, the Commission has long recognized that ILECs cannot justify billing any access charges on top of UNE rates. In the *Local Competition Order*, the Commission concluded that carriers purchasing UNEs should not be required to pay access charges, because the "payment of rates based on TELRIC plus a reasonable allocation of common costs, pursuant to section 251(d)(1), represents full compensation to the ILEC for use of the network elements that telecommunications carriers

¹⁹ 47 C.F.R., § 51.309(b) ("A telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access service to itself in order to provide interexchange services to subscribers.").

²⁰ *See id.*, §§ 51.515(b)-(c).

²¹ *Local Competition First Report and Order*, ¶ 363.

purchase.”²² The *Verizon Petition* provides no legal or policy justification for the Commission to now reverse the decision to properly allow CLECs to collect access charges.

The relief that Verizon seeks also belies the Commission’s determination that competitors leasing UNE facilities from the BOCs, including the facilities that comprise the UNE-P, are facilities based. CLECs are operating as a facilities-based carriers when they employ UNEs to offer services, and are entitled to bill and collect access charges, as the Commission has concluded in past decisions. This conclusion is consistent with the Act, in which Congress defined the term “network element” as a “facility or equipment” used in the provision of a telecommunications service, and it includes all “features, functionalities and capabilities” of the facility or equipment.²³

While Verizon argues that the UNE-P is merely a “system of uneconomic arbitrage” whereby carriers realize 50% margins “by merely reselling service over existing facilities without making any investments” their assertion runs counter to the fact that UNE-P carriers are facilities-based, and in many cases augment the loop/port combination they purchase from the incumbent with their own unique features. For instance, Telscape augments lines that it serves utilizing UNE-P by adding its own unique calling features to the line, including Telscape’s own voice mail provisioned utilizing Telscape’s own switch. Furthermore, the BOCs impose upon UNE-P carriers requirements reflecting their facilities-based status—requirements the BOCs do not require of resellers—including requiring competitors who lease UNE-P lines to obtain an ACNA, OCN, purchase routing tables, etc.

²² *Local Competition Order*, ¶ 721.

²³ 47 U.S.C. §153(29). The FCC codified a definition of the term “network element” consistent with the statute in 47 C.F.R. §51.5.

B. Verizon's Request That The Commission Forbear From Application of TELRIC to UNE-P Lines Fails to Satisfy Section 10(a)

Verizon's request that the Commission forbear from applying its TELRIC pricing rules for UNE-P fails to satisfy Section 10(a). Indeed, the baseless assertions leveled by Verizon in its petition fail to satisfy any prong of the three-prong Section 10(a) analysis. The Commission has long held that in order to justify forbearance under Section 10 carriers "must support such request[s] with more than broad, unsupported allegations in order for [the Commission] to exercise that statutory authority."²⁴ The *Verizon Petition* does nothing but present "broad, unsupported allegations" that the TELRIC rules are "uneconomic" and lead to a "decline in telecommunications industry investment."²⁵ Accordingly, the Commission should reject the petition.

1. The Commission Must Maintain UNE-P Availability at TELRIC Pricing to Prevent Discriminatory Pricing by the BOCs

The Commission's rules require BOCs to charge carriers the state commission-set TELRIC rate for UNEs "unless the different rates could be justified by the costs incurred by the incumbent LEC."²⁶ In fact, the Commission has held that "regulations permitting non-cost based discriminatory treatment are prohibited by the 1996 Act."²⁷ In addition, the Act's requirement that prices be cost-based, and the prohibition against non-cost based price discrimination for UNEs is codified section 271 checklist. Checklist item 2 requires BOCs to provide

²⁴ *Hyperion Telecommunications, Inc. Petition Requesting Forbearance; Time Warner Communications Petition for Forbearance; Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd. 8596, ¶ 21 (1997).

²⁵ *Verizon Petition*, 6-12.

²⁶ *Local Competition Order*, ¶ 861.

²⁷ *Id.*, ¶ 862.

“nondiscriminatory access to network elements in accordance with the *cost-based* pricing standard of section 252(d)(1).”²⁸

At the end of the day, Verizon has failed to provide any evidence that the cost it incurs providing elements in the UNE-P configuration is any different than providing stand-alone UNEs. If anything, the manual labor involved with providing a stand-alone loop makes provisioning such loops more expensive than UNE-P loops. For example, in California, SBC charges Telscape 1.5 hours of labor associated with an SBC coordinated hot-cut. No such labor is involved with a UNE-P loop cutover. Verizon’s cost of providing a loop is likely much less when the loop is combined with an unbundled switch port.

Verizon claims that “the current TELRIC pricing rules also have caused CLECs to curtail the use of their existing facilities in favor of the UNE Platform and artificially low rates.”²⁹ The arguments Verizon raises in a vain attempt to justify its proposal for price discrimination against UNE-P carriers are without merit. In fact, millions of households are now purchasing service from competitors utilizing the UNE-P,³⁰ and price competition in the industry is intense. In fact, Telscape’s operations themselves are further evidence of the fact that the availability of UNE-P complements infrastructure investment: Telscape serves approximately 65% of its customer base over its own facilities, utilizing UNE-P to acquire customers only where Telscape facilities are not available.

Moreover, the Supreme Court has already rejected Verizon’s argument that TELRIC discourages telecommunications investment. In *Verizon v. FCC* the Court held that Verizon’s argument “founders on fact” when it argues that TELRIC pricing does not produce

²⁸ 47 U.S.C. § 271(c)(2)(B)(ii).

²⁹ *Verizon Petition*, 9.

³⁰ See FCC Status of Local Competition Report (rel. June 3, 2003)(available at www.fcc.gov/wcb/stats.)

new telecommunications investment.³¹ The Supreme Court rejected as specious Verizon's argument that "a different forward-looking pricing scheme [besides TELRIC] would have generated even greater competitive investment than the \$55 billion" that has been invested since the passage of the Act.³² In fact, even with recent declines in investment in the industry, telecommunications investment remains well above historical levels

2. The Commission Must Maintain TELRIC Pricing for UNE-P To Protect Consumers

Verizon falsely asserts that "applying the current pricing rules to UNE-P is not necessary to protect consumers,"³³ but FCC data tell a different story. The Commission's most recently released local competition data indicates that over 12 million lines are served by UNE-P.³⁴ In response to UNE-P competition, the BOCs have lowered their residential and small business rates dramatically and rolled out new service offerings to match the prices and packages offered by UNE-P competitors. The net result is that consumers nationwide have benefited dramatically from UNE-P competition.

UNE-P has provided great consumer benefits, despite the anticompetitive restraints that BOCs engage in to make large numbers of consumer lines ineligible for conversion to UNE-P. For example, BOCs will not provide DSL service to end users that seek local voice service from UNE-P carriers, an issue Telscape is currently litigating before the California Public Utilities Commission.³⁵ Indeed, analysts noted that they expected Verizon to

³¹ *Verizon v. FCC*, n. 1.

³² *Verizon v. FCC*, 467.

³³ *Verizon Petition*, 20.

³⁴ See FCC Status of Local Competition Report (rel. June 3, 2003)(available at www.fcc.gov/wcb/stats.)

³⁵ See *Telscape Communications Corp. v. Pacific Bell Telephone Company*, Case No. 01-22-011, California Public Utilities Commission (filed Nov. 5, 2002).

avoid losing lines to UNE-P carriers by mimicking the success that SBC had in utilizing the bundling of local, long distance and DSL to prevent line loss to UNE-P based competitors.³⁶ To the extent that the Commission would grant Verizon's petition, it would allow the BOCs to significantly increase in UNE prices, and would lead to a shrinking number of consumers could take advantage of competitively price UNE-P provided services.

3. Granting Verizon's Requested TELRIC Relief Would Harm the Public Interest

The public interest prong of Section 10 of the Act requires the Commission "to consider whether forbearance will promote competitive market conditions, including whether it will enhance competition among existing telecommunications providers."³⁷ In addition, "a determination that forbearance will promote competition may be the basis for a finding that forbearance is in the public interest."³⁸ Verizon argues that "the application of TELRIC to UNE-P has unquestionably contributed to a massive decline in telecommunications industry investment, directly contravening the core goal of the 1996 Act."³⁹ But again, Verizon offers no evidence of this assertion, and the available facts tell another story. Commission statistics demonstrate that UNE-P competition has provided significant consumer benefits.

Indeed, Verizon itself seems to be benefiting greatly. In the face of a stunted wholesale market and languishing investment, somehow Verizon and the other BOCs continue to earn record profits.⁴⁰ In the second quarter of 2003, Verizon reported revenues approximately

³⁶ See GoldmanSachs, Analyst Comment: Verizon Communications (July 30, 2003). ("Goldman Comment").

³⁷ *Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, First Report and Order, 15 FCC Rcd 17414, ¶4 (2000).

³⁸ *Id.*

³⁹ *Verizon Petition*, 6.

⁴⁰ See *Goldman Comment* (With revenues of 16.8 billion, Verizon is "still our favorite RBOC").

\$16.90 billion. Moreover, even though UNE-P competition continues to grow, the BOCs continue to tell Wall Street that they will meet all financial expectations, and analysts expect losses to UNE-P carriers to improve.⁴¹ And even Verizon's friends on Wall Street note that "incremental competition will emerge in the second half [of 2003] as Pennsylvania has lowered its UNE rates..."⁴² At worst, UNE-P competition forces the BOCs to keep their retail prices down, preventing them from raising rates after decimating competition.

IV. CONCLUSION

Consistent with the foregoing, the Commission should deny Verizon's Petition,.

Respectfully submitted,



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⁴¹ See *Goldman Comment*, 2.

⁴² See *Goldman Comment*, 3.